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Typhoid Marys.

**TYPHOID MARYS:  
THE PLIGHT OF THE MODERN LAW FIRM**

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A similar problem arises when a lawyer for law firm has previously represented a client and then seeks to represent another client in circumstances where the former client's confidential information may be disclosed or such representation will cause damage to the administration of justice. The traditional test stated in *Robson v Miller Mackenzie & Co* (1972) 1 OR 231 no longer represents the law in New Zealand see *Black v Taylor* (1991) 3 NZLR 441. The appropriate legal position for this analogous problem has been considered and dealt with well by both the authors of this paper. For further analysis of this issue, the reader is referred to M. J. Dean & C. P. Hartigan "Conflicts of Interest: When may a lawyer represent a former client?" (1990) NZLJ 43, C. P. Hartigan & M. J. Dean "Conflicts of Interest: The Most Known" (New Zealand Law Society Seminar, 1991) 26 NZLJ "Confidentiality, Confidential Interest and Chinese Walls" (1992) 15 NZLJ 224, Andrew "Chinese Walls and Conflicts of Interest" (1992) 18 NZLJ 21.



## I INTRODUCTION

It has become commonplace in modern legal practice for lawyers to transfer their employment between firms. This creates significant ethical difficulties for the lawyer and the lawyer's new firm. It is inherent in the nature of legal practice that, while working for a client, a lawyer will obtain confidential information. The risk that exists for the transferring lawyer's new firm is that the new lawyer will "taint" other members of the firm, causing it to be disqualified from continuing to represent some of its existing clients. This new lawyer is a "Typhoid Mary".

A lawyer who transfers employment to another law firm may have represented a client whose interests are opposed to those of an existing client of the new firm.<sup>1</sup> In this situation, the transfer of employment has implications for the lawyer and the new law firm. Depending on the circumstances, both the transferring lawyer and the entire law firm may be disqualified from continuing to act.

The paper addresses the circumstances in which law firms can prevent their disqualification when a Typhoid Mary joins the firm. Parts II and III analyse the positions adopted by courts in Canada and the United States. Part IV examines the measures that can be adopted to prevent the disqualification of the firm. Both Chinese walls and cones of

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1 A similar problem occurs where a lawyer (or law firm) has previously represented a client and then seeks to represent another client in circumstances where the former client's confidential information may be disclosed or such representation will cause damage to the administration of justice. The traditional test stated in *Rakusen v Ellis Munday & Clarke* [1912] 1 Ch D 831 no longer represents the law in New Zealand: see *Black v Taylor* [1993] 3 NZLR 403. The appropriate legal position for this analogous problem has been considered elsewhere and will not be dealt with for the purposes of this paper. For further analysis of this issue, the reader is referred to MR Dean & CF Finlayson "Conflicts of Interest: When may a lawyer act against a former client?" [1990] NZLJ 43; GP Barton, CF Finlayson & RA Dobson "Conflicts, Undertakings & Privilege - The Must Knows" (New Zealand Law Society Seminar, 1991); JR Midgley "Confidentiality, Conflicts of Interest and Chinese Walls" (1992) 55 MLR 822; L Aitken "Chinese Walls and Conflicts of Interest" (1992) 18 Mon U LR 91.



silence<sup>2</sup> are considered. Part V analyses the approach taken in a recent New Zealand case. The policy considerations relevant to deciding the appropriate disqualification rule for New Zealand are examined in Part VI. Parts VII and VIII analyse the disqualification standard that should be developed in New Zealand and identifies other factors that should influence a court in deciding whether to disqualify a firm.

The thesis of this paper is that the New Zealand courts should disqualify a firm only in circumstances where there is legitimate concern for the position of the lawyer's former client. This concern usually arises because the transferring lawyer may disclose confidential information about the former client to other lawyers in the new firm. A properly instituted Chinese wall should be recognised as one factor that the courts can draw upon in order to conclude that the former client will not be detrimentally affected by the lawyer's movement to another firm. It should not, however, be the sole factor.

The court must consider two interrelated questions when confronted with an application to disqualify a firm who has hired a transferring lawyer:<sup>3</sup> first, whether the transferring lawyer is disqualified from continuing to act; secondly, if the lawyer is disqualified, whether the entire law firm should be disqualified from continuing to act for an existing client whose interests are opposed to those of a client of the lawyer's former firm.

This second question is the focus of this paper. However, the analysis would be incomplete if the former question was ignored. The approach of the Canadian Supreme Court in resolving both questions is examined below.

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<sup>2</sup> Chinese walls and cones of silence are barriers erected by law firms to prevent the flow of confidential information between lawyers in the same firm. For further explanation, see Part IV.

<sup>3</sup> RB Batemen "Return to the Ethics Rules as a Standard for Attorney Disqualification: Attempting Consistency in Motions For Disqualification by the Use of Chinese Walls" (1995) 33 DUQLR 249, 253; JG Koeltl and J Oestericher "Double-Edged Disqualification Motions" (1993) 19 Litigation 38.



## II THE APPROACH OF THE CANADIAN SUPREME COURT

The Supreme Court of Canada considered the position of a transferring lawyer and the new law firm in the leading case of *MacDonald Estate v Martin*.<sup>4</sup> The case concerned a junior lawyer who possessed confidential information, about a plaintiff engaged in litigation. The lawyer subsequently transferred to a law firm who was acting for the defendant in the same litigation. The defendant sought an order removing the lawyer's new firm as the solicitor of record. A unanimous Supreme Court disqualified the law firm from continuing to act.

### A *The Majority Approach in MacDonald Estate v Martin*

In determining whether the transferring lawyer and the new law firm should be prevented from continuing to represent a client, the majority<sup>5</sup> of the Supreme Court recognised that "the movement of lawyers from one firm to another are familiar features of the modern practice of law."<sup>6</sup> Sopinka J identified three competing values that had to be balanced in deciding the case:<sup>7</sup>

There is first of all the concern to maintain the high standards of the legal profession and the integrity of our system of justice. Furthermore, there is the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause. Finally, there is the desirability of permitting reasonable mobility in the legal profession.

Sopinka J placed the greatest emphasis on the first factor. He considered that the loss of public confidence in the confidentiality of information passing between a solicitor and

<sup>4</sup> (1991) 77 DLR (4th) 249.

<sup>5</sup> The majority judgment was delivered by Sopinka J and was concurred in by Dickson CJC, La Forest and Gonthier JJ.

<sup>6</sup> Above n 4, 255.

<sup>7</sup> Above n 4, 254.



client would deliver a serious blow to the integrity of the profession and to the administration of justice.

After an extensive review of authority, Sopinka J concluded that a standard which prevented not only actual conflicts of interest but also the appearance of conflict was required. The test he adopted was whether the reasonably informed person would be satisfied that no use of confidential information would occur.

Sopinka J proposed a two stage inquiry to decide whether disclosure of confidential information would occur. First, the court must determine whether the lawyer received confidential information from a former client relevant to the current matter. Where the current and former representations are sufficiently related, the court will presume that the transferring lawyer possesses confidential information pertaining to the former client. The onus of rebutting this inference is a heavy one and falls on the solicitor who faces disqualification. Secondly, the court will consider whether the confidential information will be misused. Where both tests are satisfied, disqualification of the lawyer is automatic.

For other lawyers in the transferring lawyer's new firm, the answer to the question of whether the confidential information has been misused is less clear. Does the risk that the confidential information may be misused by other lawyers in the firm justify disqualification of the whole firm? Sopinka J considered that a rule assuming that the knowledge of one lawyer is the knowledge of every lawyer in the firm was "unrealistic in the era of the mega-firm."<sup>8</sup> However, Sopinka J recognised that there is a strong inference that lawyers who work together share each other's confidences. Confidential information will be presumed to have been shared within the firm unless the contrary is shown. Therefore, the entire firm will be disqualified unless it can show that all reasonable measures were taken to ensure that the tainted lawyer did not disclose information to

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<sup>8</sup> Above n 4, 268.



other members of the firm. Sopinka J thought that Chinese walls could serve this purpose only in exceptional circumstances.

The standard proposed by Sopinka J reflects the paramount importance of preserving the integrity of the justice system. This requires the protection of the former client's confidential information. However, Sopinka J recognised that the mobility of lawyers and allowing clients to choose their representation are important interests which cannot be ignored. A rebuttable presumption that confidences have been disclosed to other lawyers in the firm strikes an appropriate balance between these interests.

*B The Minority Approach in MacDonald Estate*

The minority<sup>9</sup> sought to impose a stricter duty than the majority. Cory J's persuasive judgment is underpinned by the rationale that ensuring the appearance of justice is fundamental. Although the desirability of a client retaining counsel of choice and the mobility of the legal profession are important considerations, they must not detract from ensuring the integrity of the justice system.<sup>10</sup> The essence of the minority's concern is expressed in the following terms:<sup>11</sup>

[T]he integrity of the judicial system is of such fundamental importance to our country and, indeed, to all free and democratic societies that it must be the predominant consideration in any balancing of these three factors.

Cory J stated that, where a lawyer who possesses confidential information joins a firm acting for a client involved in litigation against a former client, there should be an

<sup>9</sup> The minority judgment was delivered by Cory J and was concurred in by Wilson and L'Heureux-Dubé JJ.

<sup>10</sup> Above n 4, 274. For an analysis of the extent of the difference between the minority and majority on this point see HP Glenn "Standard For Disqualification of Law Firm to Act in Litigation: *MacDonald Estate v Martin*." (1991) 70 Can Bar Rev 351, 356-359.

<sup>11</sup> Above n 4, 272.



irrebuttable presumption that lawyers who work together share each other's confidences. Therefore, knowledge of the confidential matters is imputed to other members of the firm. Such a strict test is required to maintain public confidence in the administration of justice.

The size of the law firm, in Cory J's opinion, should not reduce the standard imposed on the law firm.<sup>12</sup> Cory J would not permit "mega-firms" or the lawyers who wish to join them dictate the course of legal ethics. Cory J doubted whether Chinese walls could ever serve to protect the interests of former clients:<sup>13</sup>

No matter how carefully the Chinese wall may be constructed, it could be breached without anyone but the lawyers involved knowing of that breach. ...They do not change the reality that lawyers in the same firm meet frequently nor do they reduce the opportunities for the private exchange of confidential information. The public would, quite properly, remain sceptical of the efficacy of the most sophisticated protective scheme.

The stricter standard imposed by the minority reflects those judges' view that preventing disclosure of confidential information is of paramount importance. This strict view was not shared by the majority.

#### C *The Response to MacDonald Estate in Canada*

The legal profession in Canada responded swiftly to the decision in *MacDonald Estate*. In 1993, a Canadian Bar Association report set out guidelines on the type of screening mechanisms required to prevent disqualification of law firms in circumstances similar to those in *MacDonald Estate*.<sup>14</sup> The guidelines concluded that the "use of [Chinese walls is] permitted in appropriate circumstances to permit law firms with [*MacDonald Estate v*

<sup>12</sup> Above n 4, 274.

<sup>13</sup> Above n 4, 273-274.

<sup>14</sup> Canadian Bar Association Task Force Report "Conflict of Interest Disqualification: *Martin v Gray* and Screening Methods" February 1993. *MacDonald Estate v Martin* is sometimes referred to as *Martin v Gray*.



*Martin*] conflicts to avoid disqualification." The guidelines then set out the steps that should be taken to institute these screening mechanisms so that they will be effective.

In a recent case, a law firm put screening mechanisms in place to prevent its disqualification when an associate transferred into the firm. The court relied upon the reasoning of the majority in *MacDonald Estate* and the guidelines of the Canadian Bar Association in dismissing the possibility that confidential information would be disclosed. The law firm was not disqualified.<sup>15</sup>

### III DEVELOPMENTS IN THE UNITED STATES

As has been seen, the Supreme Court in *MacDonald Estate* used presumptions to decide the issues which they faced. The courts in the United States have also relied on presumptions to formulate disqualification rules and to determine in what circumstances it is appropriate for the law firm to continue to act. More than in any other jurisdiction, United States courts have considered the conceptual underpinnings and practical implications of law firm disqualification. The case law in the United States will be analysed to determine principles which may inform any decision that a New Zealand court may make on law firm disqualification.

#### A *Disqualification of the Transferring Lawyer*

The first issue is whether the transferring lawyer can personally act for a client of the new firm against the interests of his or her former clients. Where the transferring lawyer actually possesses or is presumed to possess the confidential information of a client of the former firm, the lawyer will be disqualified from acting against the interests of that client.

<sup>15</sup> *Watson v Trace Estate* (1994) 29 CPC (3d) 180. See also *Ford Motor Company of Canada Ltd v Osler, Hoskin & Harcourt* (1995) 131 DLR (4th) 419. These cases indicate that first instance courts in Canada are willing to allow Chinese walls to prevent disqualification of law firms.



Where a substantial relationship between the work performed by the lawyer for the former client and the current matter exists, the court assumes that "during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the [current] representation."<sup>16</sup> The court will disqualify the lawyer from acting on the current matter where this test is satisfied. Evidence establishing actual disclosure of confidences is not required. Therefore, the client does not have to disclose in court the confidences that they wanted to protect.

Where a substantial relationship is established, the general rule is that the lawyer is irrebuttably presumed to possess confidential information.<sup>17</sup> The difficulty with adopting an irrebuttable presumption is that it is over-inclusive. A lawyer can be disqualified in circumstances where the lawyer can actually prove that he or she had not worked on a matter and in fact held no confidential information.<sup>18</sup>

<sup>16</sup> *T C Theatre Corp v Warner Bros Pictures Inc* 113 F Supp 265 (SDNY, 1953).

<sup>17</sup> Bateman, above n3, 266. Defining what constitutes a substantial relationship is therefore of critical importance because it will, in effect, determine whether the firm is disqualified. The definitions of a substantial relationship vary between the different Circuits. However, most Circuits require a relationship between factual contexts of the former and the current representation. For a fuller discussion, see Comment "Developments in the Law - Conflict of Interest in the Legal Profession" (1981) 94 Harv LR 1247, 1323-1333.

<sup>18</sup> *Trone v Smith* 621 F 2d 994, 998-999 (9th Cir, 1980). The apparent reason for disqualification in these circumstances was due to early Circuit courts' reliance on the American Bar Association Model Code of Professional Responsibility when deciding whether to disqualify law firms. Canon 9 of the Model Code required avoiding even the "appearance of impropriety". This requirement strongly influenced some courts and lead to the development of a very strict disqualification rule for the lawyer involved. See, for example, *T C Theatre*, above n 16, and *Emle Industries v Patentex Inc* 478 F 2d 562 (2nd Cir, 1973). Due to other decisions of the courts and the revocation of the Model Code, the importance of the appearance of propriety is no longer the central justification for the disqualification rule. See further DR McMinn "ABA Formal Opinion 88-356: New Justification for Increased Use of Screening Devices to Avert Attorney Disqualification" (1990) 65 NYULR 1231, 1236-1244.



Some courts have responded to this difficulty.<sup>19</sup> These decisions have held that the transferring lawyer is rebuttably presumed to possess confidential information. Where the lawyer can prove that there was no realistic chance that he or she obtained the confidences of the former client, the presumption is rebutted. Such a rule prevents the disqualification of a lawyer who had no actual involvement with a client of the former firm or who worked only on peripheral matters. The realities of the situation are therefore considered.

### B Disqualification of the Entire Firm

If the transferring lawyer is disqualified, the former client may seek to extend the disqualification to the transferring lawyer's new firm. To determine whether the entire firm should be disqualified, courts have used a presumption that the transferring lawyer shares confidences with other lawyers in the new firm. Disqualification prevents the new firm from misusing confidential information about the transferring lawyer's former client.

Initially, courts held the presumption of shared confidences to be irrebuttable. Where the transferring lawyer was disqualified from acting on certain matters, this disqualification automatically spread to the entire firm.<sup>20</sup> The notion that information flows freely between lawyers in the office, so that the knowledge of one lawyer is the knowledge of all, provides the justification for the disqualification of the firm. The consequence of such a strict rule was that disqualification applications were used to disqualify the entire firm even

<sup>19</sup> *Silver Chrysler Plymouth Inc v Chrysler Motors Corp* 518 F 2d 751 (2nd Cir, 1975); *Cheng v GAF Corp* 631 F 2d 1052 (2nd Cir, 1981); *Freeman v Chicago Musical Instrument Co* 689 F 2d 715 (2nd Cir, 1982). For a comprehensive discussion of the leading case of *Silver Chrysler* see HM Liebman "The Changing Law of Disqualification: The Role of Presumption and Policy" (1979) 72 NULR 996.

<sup>20</sup> There are two reasons that some courts in the Seventh Circuit have used to justify the irrebuttable presumption. First, it avoids the necessity of having to disclose the actual confidential information in open court. Secondly, an irrebuttable presumption is required by the spirit of Canon 9 of the Model Rules to avoid even the appearance of impropriety. See generally the Seventh Circuit decision in *Novo Therapeutisk Laboratorium v Baxter Travenol Lab Inc* 607 F 2d 186 (7th Cir, 1979).



where no confidential information had been passed by the disqualified lawyer to other members of the firm.

The recent trend is for courts to rebuttably presume that confidences have been disclosed. A rebuttable presumption protects the interests of the former client while not unnecessarily inhibiting clients' ability to choose which law firm represents them or restricting the growing mobility of lawyers. No undue hardship is caused to the law firm or to an existing client of the firm. Therefore, in relaxing the strict rule, the courts are seeking to fairly balance the interests of current and former clients to reach a just and sensible result.<sup>21</sup> The law firm should be disqualified only where protection of the former client's interests is legitimately required.

The rationale for preferring a rebuttable presumption was persuasively stated in *Analytica Inc v NPD Research Inc*:<sup>22</sup>

If prior representation of a particular client will irrebuttably disqualify an entire firm from handling certain cases the result could easily be whole law firms of "Typhoid Marys." This would have a drastic impact on the careers of attorneys in entire firms, would impede the clients' rights to be represented by attorneys of choice and would discourage attorneys with expertise in a particular field of law from handling cases in their respective specialties.

The court recognised that to hold fast to an irrebuttable presumption was unnecessarily inflexible and ignored the reality of a modern law firm's operation. The leading case of *Schiessle v Stephens*<sup>23</sup> applied these principles to the transfer of a lawyer between two

<sup>21</sup> See *Novo Therapeutisk Laboratorium v Baxter Travenol Lab Inc*, above n20.

<sup>22</sup> 708 F 2d 1263, 1277 (7th Cir, 1983).

<sup>23</sup> 717 F 2d 417 (7th Cir, 1983). This was the first case where a rebuttable presumption was adopted for lawyers transferring between private firms. All the previous cases concerned ex-government lawyers transferring into private practice. The use of the rebuttable presumption was justified on the basis that because these lawyers could not readily enter private practice, the Government would be deprived of



private firms. Although the law firm was disqualified, the court applied a rebuttable presumption that confidences had been shared. The lead taken by the Seventh Circuit in *Schiessle v Stephens* has generally been followed in the other Circuits.<sup>24</sup> The noteworthy exception is the Tenth Circuit.<sup>25</sup>

Where the court adopts a rebuttable presumption, the issue becomes what is required to successfully rebut the presumption. The presumption is rebutted if the new law firm can conclusively show that other lawyers did not receive confidential information from the transferring lawyer.

Precisely what is required to show that other lawyers in the firm did not receive confidential information is unclear. The method most commonly adopted by law firms to rebut the presumption that confidential information is shared is by establishing a Chinese wall or cone of silence as soon as the conflict of interest arises.<sup>26</sup> However, *Panduit Corp*

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capable lawyers. The extension of the rebuttable presumption in *Schiessle* was controversial and is still not universally accepted.

<sup>24</sup> *Cheng v GAF Corp*, above n19; *Nemours Foundation v Gilbane Aetna Federal Ins Co* 632 F Supp 418 (D Del, 1986); *Manning v Waring Cox James Sklar & Allen* 849 F 2d 222 (6th Cir 1988); *Cox v American Cast Iron Pipe Co* 847 F 2d 725 (11th Cir, 1988); *EZ Paints Corp v Padco Inc* 746 F 2d 1459 (Fed Cir, 1984).

<sup>25</sup> *Graham v Wyeth Laboratories* 906 F 2d 1419 (10th Cir, 1990); *SLC Ltd v Bradford Group West Inc* 999 F 2d 464 (10th Cir, 1993). These cases expressly reject the approach adopted in the Seventh Circuit to deal with disqualification applications faced by firms who hired a new lawyer who hold confidential information on a substantially related matter. Both cases reject as unrealistic the presumption that all members of a firm have access to all information held within the firm. Without the presumption of shared confidences, the court would have to find as a fact that the firm had actual knowledge of the information known by the (tainted) transferring lawyer. These decisions represent a significant increase in the difficulty that a former client will face in vicariously disqualifying a law firm. See the criticism of both decisions in M Madden "Where Does the Tenth Circuit Stand on Rules Concerning Conflict of Interest and Disqualification Rules?" (1994) J Contemp L 479.

<sup>26</sup> See Part IV.



*v All States Plastic Manufacturing Co*<sup>27</sup> demonstrates that the presumption can be rebutted even though the law firm had instituted no formal screening procedures. On the basis of the transferring lawyer's testimonial evidence, the court was satisfied that no confidential information had passed or was likely to pass. The court observed that screening mechanisms were only one way in which the presumption of shared confidences can be overcome.<sup>28</sup> Part IV considers the efficacy of Chinese walls and cones of silence to prevent disqualification of law firms.

### C A Limitation on the Presumption of Shared Confidences

As Part III.A demonstrates, a transferring lawyer will be presumed to possess confidential information where the litigated matters are substantially related. The courts have been willing to use the presumption of shared confidences to disqualify the *firm* only where the transferring lawyer has *actual* as opposed to presumptive knowledge of a former firm's client's affairs.<sup>29</sup> It is unlikely that the law firm will be disqualified on the basis that the transferring lawyer possesses presumptive knowledge.<sup>30</sup>

The justification for this limitation is to preserve the mobility of lawyers. If the limitation did not exist, the mere fact that a lawyer had been employed in one firm would mean that he or she would presumptively hold a significant amount of confidential information about that firm's clients. These lawyers would find it virtually impossible to change employment without the risk of disqualifying their new firms from representing certain clients.

<sup>27</sup> 744 F 2d 1564 (Fed Cir, 1984).

<sup>28</sup> Above n 27, 1580. For a contrary view see M Brodeur "Building Chinese walls: Current Implementation and a Proposal for Reforming Law Firm Disqualification" (1988) 7 Rev Litig 167, 177.

<sup>29</sup> See *Arkansas v Dean Food Products Co* 605 F 2d 380, 386 (8th Cir, 1979); *American Can Co v Citrus Feed Co* 436 F 2d 1125, 1129 (5th Cir, 1971); *Cox v American Cast Iron Pipe Co*, above n24.

<sup>30</sup> McMin, above n 18, 1254.



#### IV DEFENCES FOR LAW FIRMS: CHINESE WALLS AND CONES OF SILENCE

Implementing Chinese walls and cones of silence are measures which law firms can take to prevent the flow of confidential information between lawyers in a firm. If successful, they prevent the confidential information known by one lawyer being imputed to other lawyers in the same firm. Courts in the United States have approved using both mechanisms on numerous occasions. The developments in the United States may therefore be relevant to New Zealand.

##### A Chinese Walls

Chinese walls are the most common mechanism relied upon to defeat any potential disqualification application. A Chinese wall is a set of procedural and physical barriers that prevent the flow of information between lawyers in the same firm.

The large majority of courts in the United States have in principle approved the use of Chinese walls to prevent knowledge being imputed to all lawyers in a firm.<sup>31</sup> The landmark case of *Kesselhaut v United States*<sup>32</sup> first approved the use of Chinese walls to prevent "vicarious" disqualification.<sup>33</sup> The court held that the law firm should be entitled to rely on screening procedures that ensured the transferring lawyer did not disclose confidences to other members of the firm and thereby disqualify the firm. Such measures prevent the lawyer becoming a "Typhoid Mary", a lawyer whom firms decline to hire because of the

<sup>31</sup> The United States Supreme Court has ruled that appeals from disqualification applications which have granted or denied disqualification of the law firm are interlocutory matters which cannot be appealed to the federal appellate courts. This decision inhibits the federal courts' ability to re-evaluate the status of Chinese walls: *Richardson-Merrell Inc v Koller* 472 US 424 (1985).

<sup>32</sup> 555 F 2d 791 (Ct Cl, 1977).

<sup>33</sup> The term vicarious disqualification is used to describe the disqualification of an entire firm caused by a transferring lawyer. Synonyms for this term include imputed disqualification, entity disqualification and firm-wide disqualification.



risk that other lawyers in the firm will be tainted with the confidences of that lawyer's former client.

In recent years, most courts in the United States have accepted that a correctly instituted Chinese wall will be sufficient to rebut the presumption of shared confidences.<sup>34</sup> Although Chinese walls have generally been accepted in principle, in practice they have not achieved widespread recognition as being effective in preventing law firm's being disqualified. This is because of defects in their implementation. To be successful, a Chinese wall must be correctly instituted. Broadly speaking, a Chinese wall must consist of specific institutional mechanisms which prevent the disclosure of confidential information and be implemented in a timely manner.

#### 1 *The components of the Chinese wall*

The success or otherwise of any screening mechanism will depend on how well the court perceives the measures adopted by the firm prevent the flow of confidential information. To be effective, the Chinese wall must consist of "specific institutional mechanisms" that are sufficient to isolate the transferring lawyer.<sup>35</sup> The nature and extent of the procedures that the law firm must implement to prevent disqualification depends on the circumstances that surround the particular case.

The court in *Schiessle* identified five factors that courts consider in determining the effectiveness of a Chinese wall:<sup>36</sup>

<sup>34</sup> *Armstrong v McAlpin* 625 F 2d 433 (2nd Cir, 1980); *LaSalle National Bank v County of Lake* 703 F 2d 252 (7th Cir, 1983); *Freeman v Chicago Musical Instrument Co*, above n 19; *Schiessle v Stephens*, above n 23; *Manning v Waring Cox James Sklar & Allen*, above n 24.

<sup>35</sup> Above n 23, 421.

<sup>36</sup> Above n 23, 421. These factors have been adopted and applied by other courts. See, for example, *Manning v Waring Cox James Sklar & Allen*, above n 24.



Factors appropriate for consideration by the trial court might include, but are not limited to, the size and structural divisions of the law firm involved, the likelihood of contact between the "infected attorney" and the specific attorneys responsible for the present representation, the existence of rules which prevent the "infected" attorney from access to relevant files or other information pertaining to the present litigation or which prevent him from sharing in the fees derived from such litigation.

It is difficult to determine which factors will always be required and which will not. Courts in the United States generally require substantial restrictions on the availability of confidential information before they approve the particular Chinese wall they are assessing. For example, a firm that successfully prevented disqualification took measures which included physically removing all relevant case files to central storage and allowing only the lead counsel access; a firm-wide policy that nobody was to talk to the new lawyer about the case, any breach of which resulted in dismissal; and instructions to both legal and support staff not to leave any part of the relevant files unattended.<sup>37</sup>

The overarching principle is that the law firm must effectively isolate the transferring lawyer and take all reasonable measures to prevent him or her from disseminating confidential information to other lawyers in the firm.<sup>38</sup> More than this, however, the law firm must ensure that all staff strictly adhere to those procedures. In one case, the court saw fit to impose a Chinese wall itself, setting out the requirements for compliance and the sanctions if these procedures were not followed.<sup>39</sup> The court felt sure that these measures would prevent both intentional and inadvertent breaches of client confidences.

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<sup>37</sup> *Petroleum Wholesale Inc v Marshall* 751 S W 2d 295 (Tex Ct App, 1988). These measures are somewhat similar to those employed in *Kesselhaut v United States*.

<sup>38</sup> FW Hamermesh "In Defence of a Double Standard in the Rules of Ethics: A Critical Reevaluation of the Chinese Wall and Vicarious Disqualification." (1986) 20 U Mich JL Ref 245, 266. Refer also to the cases cited in McMinn, above n18, 1259.

<sup>39</sup> *NFC Inc v General Nutrition Inc* 562 F Supp 332 (D Mass, 1983).



## 2 *The timeliness of the Chinese wall*

The Chinese wall must be implemented before or immediately after the transferring lawyer joins the firm or immediately upon the firm becoming aware of the problem. The Chinese wall will not achieve its intended purpose if the lawyers involved have deliberately or inadvertently disclosed confidences prior to its inception.

In some circumstances the courts have disqualified law firms simply because a proposed Chinese wall was not implemented with sufficient speed. In *LaSalle National Bank v County of Lake*,<sup>40</sup> the court considered whether the disqualification of one transferring lawyer required disqualifying the entire firm from continuing to act for its client. Judge Cudhay disqualified the entire firm because the otherwise effective Chinese wall had not been implemented in a timely manner. The screening arrangement must be in place either when the lawyer first joined the firm or when the case presenting the ethical problem was accepted.<sup>41</sup> Establishing the Chinese wall in response to a disqualification application will therefore not suffice to prevent the law firm from being disqualified.

### B *Cones of Silence*

A cone of silence is when the lawyer concerned internalises the confidential information and undertakes not to disclose any information pertaining to the former client. They differ from Chinese walls because the individual lawyer undertakes to protect the confidential information of his or her former client.

Cones of silence are less frequently relied on by law firms to prevent vicarious disqualifications. However, they have been accepted by some courts. In *Neamours Foundation v Gilbane Aetna Federal Ins*<sup>42</sup> the transferring lawyer's new firm acted

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<sup>40</sup> Above n 34.

<sup>41</sup> Above n 34, 259.

<sup>42</sup> Above n 24.



against the interests of his former client. To prevent disqualification of the firm, the lawyer was immediately enclosed in a cone of silence.<sup>43</sup> He resolved not to disclose anything relating to communications, documents or information to which he had had access. When the lawyer changed firms he did not retain any documents from which to refresh his memory. The court was also influenced by the fact that most of the information to which the lawyer had had access at his former firm was non-confidential and that he was not the lead counsel. These factors helped to persuade the court that his former client's confidences would remain inviolate. The cone of silence was therefore effective to prevent the disclosure of confidences and the disqualification of the firm.

On a broader level, the court acknowledged that the mobility of lawyers would be severely restricted if the use of cones of silence was rejected out of hand.<sup>44</sup> This is a logical extension of the argument used to justify Chinese walls.

## V THE APPROACH ADOPTED IN NEW ZEALAND

Whether a lawyer and the new law firm will be disqualified when the lawyer changes firm has only been considered once by a New Zealand court. In *Equiticorp Holding Ltd v Hawkins*,<sup>45</sup> three partners in a law firm wished to transfer to a new firm. A client of the new law firm was involved in litigation against a client of the partners' former firm. One of the transferring lawyers had been directly involved with the litigation and possessed confidential information. That lawyer's former client sought to disqualify the new law firm from representing its existing client.

<sup>43</sup> The speed and deliberateness in establishing the cone of silence was an important factor in not disqualifying the firm in *Nemours*. On this point, see further *Lemaire v Texaco Inc* 496 F Supp 1308 (E D Tex, 1980).

<sup>44</sup> Above n 24, 430.

<sup>45</sup> [1993] 2 NZLR 737.



Henry J held that the protection the law affords confidential information passing between a solicitor and client must be maintained. Solicitors must avoid actual or potential conflicts of interest. The court must determine whether there is a *reasonable possibility* that the former client's confidences will be disclosed to the lawyer's new law firm. If this requirement is satisfied, the court must assess whether the risk of such disclosure is outweighed by a litigant's right to be represented by a solicitor of choice and by the desirability of preserving the reasonable mobility of lawyers. The particular factual situation must be ascertained and a final judgment made as to whether the overall public interest requires disqualification of the law firm. Henry J therefore rejected the approach adopted in *MacDonald Estate* when he said:<sup>46</sup>

I have reservations as to the desirability of introducing Court prescribed presumptions, whether they be rebuttable or irrebuttable, to the stated situations. I prefer an approach which is directed to applying the facts to general principle so as to ensure the aim of protection is fairly met in the particular circumstances.

Applying this test, Henry J held that he would disqualify the law firm from continuing to represent its client if the tainted lawyer joined the firm. No "safeguards against inadvertent disclosure" of confidential information had been put in place by the firm. Although the risk of such disclosure was small, it was not outweighed by the client's desire to retain the firm or by the lawyer's need to obtain a new position. The court considered the later factor to be of particular concern but held that it must "yield to the greater public interest in maintaining the integrity of the principle of protection."<sup>47</sup>

Henry J drew heavily on the policy considerations identified by Sopinka J in *MacDonald Estate* to determine where the overall public interest lay. Although the decisions differ on whether the use of presumptions is appropriate, both courts emphasised

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<sup>46</sup> Above n 45, 740.

<sup>47</sup> Above n 45, 741.



the importance of protecting the former client's confidential information. A law firm will be disqualified where the possibility of disclosing confidential information exists.

Part VI elaborates on the policy considerations identified by the courts as being important in considering any application for disqualification. Part VII goes on to analyse how these considerations will apply in a New Zealand context, to determine whether the departure from the approach in *MacDonald Estate* is justified.

## VI THE POLICY CONSIDERATIONS APPLICABLE IN NEW ZEALAND

Whether a lawyer can change firm and not disqualify his or her new firm from representing current clients depends on how the court reconciles the policy considerations identified below. The court must determine how much weight should be attached to each consideration.

### A *The Integrity of the Justice System and the Appearance of Justice*

Maintaining the high standards of the legal profession and the integrity of the justice system were dominant considerations in *MacDonald Estate*. The integrity of the justice system will be maintained if confidential information is not disclosed, and not perceived to be disclosed. Where a transferring lawyer causes the perception that confidential information may be disclosed, disqualification of the firm is justified to preserve the integrity of the justice system. This ensures the public's confidence in the due administration of justice is maintained.

Canadian courts have followed *MacDonald Estate* and stressed the importance of preserving former client's confidential information.<sup>48</sup> However, the majority of the Supreme Court acknowledged that the integrity of the justice system and ensuring the

<sup>48</sup> *G v International Christian Mission* (1995) 125 DLR (4th) 712; *Gouveia v Fejko* (1992) 18 CPR (3d) 12; *Chippewas of Kettle & Stoney Point v Canada* (1993) 17 CPC (3d) 5.



appearance of justice were not the only considerations in determining whether to disqualify a law firm.<sup>49</sup>

Similar concerns have influenced courts in the United States. Preserving the confidences of former clients is of primary concern.<sup>50</sup> While the courts emphasise the importance of "maintaining the highest standards of professional conduct and the scrupulous administration of justice" they recognise that other factors must be considered in defining the ambit of law firm disqualification.<sup>51</sup>

Substantial weight is accorded to ensuring the integrity of the justice system in New Zealand. *Black v Taylor* concerned a barrister who proposed to act against a former client's interests. Richardson J held that disqualification was appropriate where the integrity of the judicial process would be impaired if the lawyer continued to act. The overarching principle is that disqualification is required where a lawyer has an actual or apparent conflict of interest.<sup>52</sup> The Court of Appeal expressly relied on *MacDonald Estate* to establish the importance of the appearance of justice as a touchstone for disqualification.<sup>53</sup>

<sup>49</sup> The minority of the court held that the integrity of the justice system was the fundamental concern in determining whether to disqualify a law firm. Other considerations must not be allowed to detract from its importance. See Part II.

<sup>50</sup> See McMinn, above n 18, 1241.

<sup>51</sup> KL Penegar "The Loss of Innocence: A Brief History of Law Firm Disqualification in the Courts (1995) 8 Geo J Legal Ethics 831, 863-864

<sup>52</sup> *Black v Taylor*, above n 1, 418. See also *Merck Sharpe and Dohme (New Zealand Ltd) v Pharmaceutical Management Agency Ltd* (unreported, 7/6/96, High Court, Wellington Registry, Gallen J, CP 23/96).

<sup>53</sup> Although *Black v Taylor* is distinguishable from *MacDonald Estate* and from the situation being considered, this point is of general application and is an important indication of the likely approach of the Court of Appeal. See below n 74.



Ensuring the protection of confidential information and the integrity of the justice system are not the only considerations influencing the success of a disqualification application. Should their obvious importance be outweighed by other factors when a lawyer transfers between firms in New Zealand?

*B Litigants Not Being Deprived of their Choice of Counsel*

When a law firm is disqualified from representing the interests of a client because a member of the firm has represented an adverse interest of the current client on a related matter, the client is effectively deprived of the right to be represented by the law firm that they choose.

In the United States, the Seventh Circuit has acknowledged the delicate balance between "the sacrosanct privacy of the attorney-client relationship (and the professional integrity implicated by that relationship) and the prerogative of a party to proceed with counsel of its choice."<sup>54</sup> The two interests can be reconciled. Where the possibility that confidential information will be disclosed is remote, there is no objection in policy terms to the court allowing the client to retain their first choice of counsel. The courts are suspicious of disqualification applications whose apparent purpose is to deprive a client of her lawyer. For example, the court in *Manning* said:<sup>55</sup>

Unquestionably, the ability to deny one's opponent the services of capable counsel is a potent weapon. Confronted with such a motion, courts must be sensitive to the competing public policy interests of preserving client confidences and of permitting a party to retain counsel of his choice.

The courts will not look favourably upon a disqualification application being used to prevent an opposing party from retaining a particular firm to represent them in litigation. There is no benefit to the administration of justice where a litigant can improve their

<sup>54</sup> *Schiessle v Stephens*, above n 23, 420.

<sup>55</sup> Above n 24, 224.



position by depriving an opponent of competent counsel. Hamermesh states the commonly used justification for this view:<sup>56</sup>

[T]he [disqualification] rule should not be permitted to interfere needlessly with the right of litigants to obtain competent counsel of their choosing, particularly in specialised areas requiring special technical training and experience.

The courts have recognised that law firms should be disqualified only where absolutely necessary, in order not to unduly deprive clients of their representation.<sup>57</sup> This is because disqualification of law firms has serious consequences. A new law firm must be found, instructed and briefed. In many circumstances the disqualification order will not permit the work product of the first firm to be shared with the newly retained law firm.<sup>58</sup> It will involve significant expense and unnecessary duplication of work to bring the new firm up to speed.<sup>59</sup>

However, the problem is more serious than this. Where the disqualification application is granted close to when the litigation is scheduled to start, it may prove impossible for lawyers in the new firm to gain a complete understanding of the factual and legal issues that are involved in a complex case.<sup>60</sup> An influential note in the Yale Law Journal observed that an over-inclusive application of firm-wide disqualification rules will unnecessarily restrict other parties from access to the legal talent most familiar with the facts of their case.<sup>61</sup> Peterson has argued that the effects of this are two fold. There is the psychological

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<sup>56</sup> Hamermesh, above n 38, 274.

<sup>57</sup> See *Freeman v Chicago Musical Instrument Co*, above n 19, 722. In New Zealand, the right of clients to choose their representation is not unfettered. See *Gazley v Attorney-General* (1995) 8 PRNZ 313; *Gazley v Attorney-General* (unreported, 16/7/96, Court of Appeal, CA 52/94J).

<sup>58</sup> For example, *EZ Paints Corp v Padco Inc*, above n 24.

<sup>59</sup> McMinn, above n 18, 1249-1250; *David Lee & Co v Coward Chance* [1990] 3 WLR 1278, 1285-1286

<sup>60</sup> See the dissenting judgment of Judge Coffey in *Analytica Inc v NPD Research Inc*, above n 22.

<sup>61</sup> Note "Disqualification of Attorneys for Representing Interests Adverse to Former Clients" (1955) 64 Yale LJ 917, 928.



hardship, because the client must obtain new counsel with whom the client has not worked before and the financial hardship, being the fees that the client incurs in reinstructing counsel.<sup>62</sup>

Where the firm is advising in a highly specialised area, disqualification of the firm deprives the client of the specialised skill, expertise and experience that the law firm may possess or has accumulated over time.<sup>63</sup> These factors are likely to be why the client retained the law firm in the first place.

### C *The Mobility of the Legal Profession*

Preserving the mobility of lawyers was of concern to the court in both *MacDonald Estate* and *Equiticorp Holdings*. Both courts weighed the effect of the law firm being disqualified against the importance of protecting confidential information. In *Equiticorp Holdings*, Henry J expressed concern that his decision effectively impeded the ability of the lawyer possessing the confidential information to obtain a new position, but held that this concern must yield to ensuring the protection of confidential information.

Where a transferring lawyer may cause the law firm to be disqualified from continuing to work for an existing client, that lawyer will face difficulty in transferring between law firms. Law firms may not be prepared to risk the possibility that they will be disqualified from representing an existing client, simply to hire a single lawyer. Preserving the mobility of lawyers requires that law firms must be afforded the opportunity to prevent disqualification of the firm when a lawyer holding relevant confidential information joins the firm.

<sup>62</sup> CA Peterson "Rebuttable Presumptions and Intra Firm Screening: the New Seventh Circuit Approach to Vicarious Disqualification of Litigation Counsel" (1984) 59 Notre Dame L Rev 399, 400-401.

<sup>63</sup> See *Government of India v Cooks Industries* 569 F 2d 737 (2nd Cir, 1978).



The importance of the mobility of lawyers has also been recognised in the United States:<sup>64</sup>

[T]o extend the attorney's disability [ie his disqualification] to all attorneys in any firm he joins...may increase the security of former clients, but it devastates the attorney's future employment prospects. In such situations permitting Chinese wall rebuttal of the presumption of shared knowledge can save the attorney from becoming a professional pariah.

Inter-firm transfer of lawyers has become a significant feature of modern legal practice. Many courts have shown an awareness of this change in the legal profession by considering the impact that vicarious disqualification has on the mobility of lawyers. Adopting a disqualification rule that is too strict has the potential to seriously curtail the careers of lawyers simply because of a temporary association with a large law firm.

This difficulty becomes even more acute when the lawyer practises in a specialised area of law. It would be difficult for such a lawyer to transfer to a firm that practises in the same specialised area as that lawyer's previous firm and competes for a relatively small number of potential clients.<sup>65</sup> This is because of the high probability that the new law firm will act for the opponents of the transferring lawyer's former client. This consequence may prevent a lawyer from developing a specialised skill that would otherwise be highly sought after.

The argument that lawyers' mobility must be preserved when considering the disqualification of the entire firm is of obvious importance.

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<sup>64</sup> Comment, above n 17, 1366.

<sup>65</sup> Above n 51, 865.



*D Disqualification Applications Being Used for Improper Purposes*

Applications for disqualification are increasingly being used for tactical purposes during protracted litigation proceedings.<sup>66</sup> The purpose of such a motion can be to escalate costs, to cause inconvenience and delay,<sup>67</sup> or to remove a particularly competent opposing counsel.<sup>68</sup> Used in such a manner, successful disqualification applications serve to create an injustice rather than to prevent one. As one court stated:<sup>69</sup>

[J]udges must exercise caution not to paint with a broad brush under the misguided belief that coming down on the side of disqualification raises the standard of legal ethics and the public's respect. The opposite effects are just as likely - encouragement of vexatious tactics and increased cynicism by the public.

The frequency with which disqualification applications are brought is of real concern to the courts. One judge recently described such applications as being a "common feature of major litigation."<sup>70</sup> Disqualification applications that are used for improper tactical purposes are an abuse of process to which the court must remain alert.<sup>71</sup> Courts should not disqualify firms without good reason. It is only appropriate where the protection of a former client's confidential information is legitimately required.

If law firms are regularly disqualified in circumstances where such action is not warranted, there is a danger that a disqualification industry, similar to that in the United

<sup>66</sup> See LA Winslow "Federal Courts and Attorney Disqualification Motions: A realistic approach to conflicts of interest" (1987) 62 Wash LR 683, 683.

<sup>67</sup> *Bottaro v Hatton Association* 680 F 2d 892 (2nd Cir, 1982).

<sup>68</sup> *Dalrymple v National Bank & Trust Co* 615 F Supp 979, 985 (W D Mich, 1985). The court noted that it must "be sensitive to tactical considerations which may impel a party to seek disqualification of a particularly competent or formidable opponent."

<sup>69</sup> Above n 27, 1576-1577.

<sup>70</sup> *Manville Canada Inc v Ladner Downs* (1992) 88 DLR (4th) 208, 224. This decision was approved on appeal: (1993) 100 DLR (4th) 321, 331.

<sup>71</sup> *Black v Taylor*, above n 1, 420.



States, could develop.<sup>72</sup> To prevent such a development, the courts could impose appropriate sanctions against the party seeking disqualification where there was no realistic chance of the application succeeding. The sanctions could range from an adverse award of costs to a contempt of court order, depending on the seriousness of the abuse of process. Such measures will ensure that disqualification applications remain a shield and do not become a sword.

## VII AN APPROPRIATE APPROACH FOR NEW ZEALAND

The circumstances in which the disqualification of a transferring lawyer should extend to the entire firm are unclear. Two questions must be addressed. First, what is the appropriate balance of the policy factors identified in Part VI to develop a realistic disqualification rule which will not cause an injustice. Secondly, how much regard, if any, should be accorded to Chinese walls and cones of silence that are implemented to prevent disqualification of the entire firm. Each question shall be addressed in turn.

### A *The Appropriate Disqualification Standard*

The preceding analysis of the possible approaches suggests that three alternatives are available where the law firm seeks to act against the interests of the transferring lawyer's former client on a related matter. These alternatives all assume that the transferring lawyer is disqualified and cannot personally act:

- (i) irrebuttably presuming that confidential information has been disclosed and disqualifying the law firm;
- (ii) rebuttably presuming that confidential information has been disclosed and allowing the law firm to prove that there is no possibility of disclosure;

<sup>72</sup> PD Finn "Conflicts of Interest and Professionals" (Legal Research Foundation, University of Auckland, 1987) 21.



- (iii) an approach which has as its objective the protection of information, yet requires the court to consider the surrounding circumstances to achieve a just result.

The nature of the legal environment in New Zealand is a critical factor in choosing between these alternatives. New Zealand is different from Canada and the United States because there is a significantly smaller number of law firms. This necessarily means that a large proportion of New Zealand's legal talent is within a small handful of law firms. The significance of unnecessarily restricting clients' choice of counsel is greater when there are fewer prospective law firms to choose from. Similarly, lawyers' ability to transfer firms will be severely restricted because there may be only a very small number of law firms who can hire an experienced lawyer without facing at least one conflict of interest.

The severity of these consequences may further encourage litigants to use disqualification applications for tactical purposes, despite judicial warnings to the contrary. For these reasons, the consequences which flow from the disqualification of any one law firm could impact harshly on that firm, the transferring lawyer and the existing clients of the new law firm. Therefore, while recognising that the former client's interests require protection, a disqualification rule which allows the trial judge flexibility to determine a result which is just and fair to all parties must be adopted.

A rule that irrebuttably presumes that the knowledge of one lawyer in the firm is shared with other lawyers will result in the automatic disqualification of the law firm where the litigated matters are sufficiently related. While such a rule ensures maximum protection of former clients' confidential information, it deprives the court of the flexibility to take into account other relevant considerations. Two important considerations in New Zealand are preserving lawyers' ability to transfer firms and clients' ability to choose which firms represent them. Even where disqualification would severely and unjustifiably cause detriment to a party other than the party moving the disqualification application, the court would be required to disqualify the firm. There would be no flexibility to take into account



other circumstances once it is established that the litigated matters are sufficiently related. It is counter-intuitive to disqualify a law firm when there is no realistic chance that confidences have been disclosed.<sup>73</sup> The confidential information of former clients can be adequately protected without adopting such a harsh and unforgiving standard. An irrebuttable presumption of shared confidences is inappropriate in New Zealand.

The second alternative requires adopting a rebuttable presumption that confidences have been shared between lawyers in the same firm. The court will not disqualify the law firm where appropriate measures to protect the former client's confidential information have been taken. These measures may include, but are not limited to, Chinese walls. This is essentially the position adopted by the majority in *MacDonald Estate*.

By providing the law firm the opportunity to rebut the presumption, this standard mitigates the injustice caused by a stricter standard. The effect of the disqualification on the law firm, its lawyers and its clients is considered. These parties have the opportunity to put in place measures which would prevent the flow of confidential information. Where no confidential information has passed, there is no threat to the integrity of the justice system or to the administration of justice, and no grounds for disqualification.<sup>74</sup> In circumstances where the law firm fails to implement effective screening measures, it has no grounds on which to argue that it has been *unjustly* disqualified. This approach emphasises the protection of the former client's confidential information, but recognises that other policy

<sup>73</sup> See McMinn, above n 18, 1272-1273.

<sup>74</sup> This is the view of the majority of the court in *MacDonald Estate*. The New Zealand Court of Appeal in *Black v Taylor* indicates that damage to the administration of justice can occur even when no confidential information passes. Although valuable for its general statement of principle applicable to all former client conflicts, *Black v Taylor* is distinguishable from the situation being considered because it dealt with a *barrister* who sought to represent a client against a client whom he had previously represented. It did not deal with a transferring lawyer and did not therefore consider some of the considerations important in the latter situation and not the former.



considerations require the law firm to be able to advance reasons why it should not be disqualified in the particular circumstances.<sup>75</sup>

A similar balancing of the different interests and policy considerations can be achieved under the third suggested approach. This is the approach adopted in *Equiticorp Holdings v Hawkins*. The court must determine whether the risk of the disclosure of confidential information is sufficient to justify disqualification of the law firm. In determining whether disqualification is appropriate, the court must balance this interest against the other considerations identified in Part VI. The court therefore balances the competing interests in a way that ensures that justice is done.

Under this approach, presumptions of shared knowledge, whether rebuttable or irrebuttable, are rejected as unrealistic.<sup>76</sup> Such a position is logically sustainable, particularly for larger firms, because one transferring lawyer could not possibly disclose his or her entire knowledge of a client's affairs to all other members of the firm. However, the sharing of confidences is an assumption which courts have readily accepted, even when disqualifying lawyers who have transferred into very large firms.<sup>77</sup>

It is submitted that the second approach, the rebuttable presumption that confidential information has passed, is most appropriate in New Zealand. Former clients' confidences are of primary importance. Where the litigated matters are sufficiently related, these confidences should be presumed to be disclosed until the contrary is shown. The use of presumption is a powerful tool because the burden of preventing the disqualification falls upon the law firm once it is established that the matters are substantially related. This is appropriate because the law firm is best placed to negative the presumption by showing that confidences did not pass. A presumption based rule means that evidential difficulties

<sup>75</sup> Above n 4, 270 where the majority in *MacDonald Estate* expressly recognise this point.

<sup>76</sup> Penegar, above n 51, 835; *SLC Ltd v Bradford Group West Inc*, above n 25, 468.

<sup>77</sup> For example, *Schiessle v Stephens*, above n 23, 421; *Mallesons Stephen Jaques v KPMG Peat Marwick* (1990) 4 WAR 357, 371-374.



will not prevent the disqualification of law firms where the protection of confidential information is legitimately required.<sup>78</sup> The ultimate goal of protecting the former client's confidences could be thwarted if this difficulty was not addressed.

Therefore, the solution proposed in *MacDonald Estate* and advocated in this paper as appropriate for New Zealand avoids an extreme position. Although there is a presumption toward disqualification, disqualification is not automatic. The court is required to consider whether the circumstances indicate that confidential information did not pass. If this can be established, no damage is caused to the integrity of the justice system by permitting the law firm to continue to act. Concerns over the mobility of lawyers and clients' ability to choose their representation have also been addressed.

*B Should Chinese Walls or Cones of Silence be Adopted in New Zealand?*

Should the existence and efficacy of a Chinese wall be a factor which the courts have regard to when determining whether disqualification of law firms is appropriate? Courts in the United States and Canada have approved correctly implemented Chinese walls as a method to prevent the disqualification of law firms. Despite this, New Zealand courts are reluctant to adopt any form of Chinese wall.

New Zealand court's failure to adopt Chinese walls is because courts are sceptical as to their effectiveness. The protection that they offer has been described as "illusory".<sup>79</sup> Such concern was echoed in *Equiticorp Holdings* where Henry J considered that Chinese walls

<sup>78</sup> The "evidential difficulties" for the former client exist because it would be difficult for the former client to be able to prove that confidences have passed. Even during discovery, the former client is unlikely to be able to gather enough evidence to satisfy a court that confidential information has been disclosed. The new law firm is in a better position to present evidence that confidential information has not been disclosed. The onus of proof should remain on the law firm.

<sup>79</sup> *McNaughten v Tauranga City Council* (1987) 12 NZTPA 429, 431. See also *Mid-Northern Fertilisers Ltd v Connell, Lamb, Gerard & Co* (unreported, 18/2/85, High Court, Auckland Registry, Thorp J, A151/85); *Kupe Group Ltd v Auckland City Council* (1989) 2 PRNZ 60.



had little to offer in resolving conflicts of interest.<sup>80</sup> English and Australian judges have expressed similar scepticism.<sup>81</sup>

However, the existence of an effective Chinese wall is *one* factor that a New Zealand court should consider in determining whether the law firm should be disqualified. The perceived difficulty in allowing Chinese walls is practical and not conceptual.<sup>82</sup> Where an effective and timely Chinese wall has been established, confidential information is unlikely to pass between lawyers inadvertently. The real concern is intentional disclosure. Chinese walls are ineffective where one lawyer deliberately discloses information to another.<sup>83</sup> The lawyers involved can share information in such a way that only they know of the breach of the Chinese wall. As Wolfram has colourfully noted:<sup>84</sup>

In the end there is little but the self-serving assurance of the screening-lawyer foxes that they will carefully guard the screened-lawyer chickens. Whether the screen is breached is virtually impossible to ascertain from outside the firm.

This possibility should not deter New Zealand courts from recognising the concept of a Chinese wall. The court should analyse the Chinese wall put in place by the firm and determine whether it will be effective to prevent information disclosure.

However a Chinese wall should not be an absolute defence to law firm disqualification. Other factors will be relevant to determining whether the presumption of shared

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<sup>80</sup> Above n 45, 741.

<sup>81</sup> *In re A Firm of Solicitors* [1992] 2 WLR 809, 818-819; *Malleons Stephen Jaques v KPMG Peat Marwick*, above n 77, 371.

<sup>82</sup> See further JR Parker "Private Sector Chinese Walls: Their Efficacy as a Method of Avoiding Imputed Disqualification" (1995) 19 J Legal Prof 345, 349.

<sup>83</sup> Above n 4, 273. This was the reason why Cory J did not approve the concept of a Chinese wall in *MacDonald Estate*.

<sup>84</sup> CW Wolfram *Modern Legal Ethics* (West Publishing Co, Minnesota, 1986) 402.



confidences can be rebutted.<sup>85</sup> Where there is the suggestion of intentional disclosure, disqualification of the law firm and disciplinary action against the lawyers involved will, of course, be appropriate. Such occurrences are likely to be rare and should not provide a justification for rejecting Chinese walls.

The reliance placed on a Chinese wall will depend on the court's perception of the integrity of the Chinese wall and the integrity of the parties relying upon it. In *MacDonald Estate*, the Supreme Court required clear and convincing evidence of the wall's efficacy. There has been no analysis in New Zealand of what constitutes an effective Chinese wall.<sup>86</sup> Reliance could be placed on successful Chinese walls established overseas. United States law firms have successfully invoked Chinese walls for a number of years. Alternatively, the extensive guidelines issued by the Canadian Bar Association on what measures are required to establish an effective Chinese wall could be relied upon. The more extensive the protective measures adopted, the greater the chance that the firm will not be disqualified.

Given the initial hesitancy of the New Zealand courts towards the Chinese wall concept, a cautious approach is justified. Although Chinese walls can never be impenetrable, excluding the possibility that a Chinese wall can be effective would ignore the United States and Canadian experience. Chinese walls are a pragmatic solution to what has become a widespread problem when a lawyer changes employment in these jurisdictions. When the frequency of disqualification applications increases in New Zealand, law firms may seek to employ Chinese walls to prevent the sweeping effects of

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<sup>85</sup> See Part VIII.

<sup>86</sup> Although a Chinese wall has not been relied upon to prevent the disqualification of a law firm in New Zealand, they are relied on by banks and investment firms to prevent the disclosure of confidential information within one firm. In this context, Chinese walls have gained legislative recognition by s8(3) of the Securities Amendment Act 1988 as a defence to insider trading. New Zealand Courts could draw on this indigenous experience to judge what constitutes an effective Chinese wall. See CA Quinn "The Securities Amendment Act 1988 and the Chinese wall" (1989) 7 Otago LR 141.



disqualification. In the appropriate circumstances, Chinese walls can operate to prevent information disclosure and *should* be considered by New Zealand courts.

A similar argument applies to cones of silence. New Zealand courts have not yet considered whether a cone of silence can be effective to prevent the disclosure of confidential information to other members of the firm. The difficulty is ensuring that the lawyer enclosed in the cone of silence will not disclose confidential information. Despite this difficulty, where the court has confidence in the integrity of the lawyer involved, cones of silence should be adopted. To reject them out of hand is unnecessarily inflexible.

#### VIII PARTICULAR FACTORS THAT NEW ZEALAND COURTS SHOULD TAKE INTO CONSIDERATION

The preceding section advocates a presumption based approach to the disqualification of law firms. It acknowledges that Chinese walls have a useful function in the appropriate circumstances. In this respect, this paper adopts a position similar to that of the Canadian Supreme Court in *MacDonald Estate*. The purpose of this section is to identify and analyse factors, in addition to an effective Chinese wall, to which New Zealand courts should have regard in determining whether it is appropriate for the law firm to continue to act.<sup>87</sup>

##### A *The Seniority of the Transferring Lawyer*

The differing levels of confidential information held by law clerks and senior lawyers, and the differing consequences if that information is disclosed, mean that vicarious disqualification decisions should take into account the seniority and experience of the

<sup>87</sup> See Hamermesh, above n 38, 265-267 for an analysis of similar factors from a United States perspective.



transferring lawyer. The more senior the lawyer, the greater the court's willingness to disqualify the law firm should become.<sup>88</sup>

A senior lawyer in a law firm will, by virtue of his or her position, know a significant amount about a client's affairs. Such knowledge is not limited to the factual background and the specific advice being given, but includes a deeper understanding of the client's strengths, weaknesses and fears. This level of knowledge comes from the regular personal contact the senior lawyer and the client are likely to have. Because a senior lawyer is likely to possess such detailed information, they pose a substantial threat to their clients if they transfer firm and work against that client's interests. In a number of instances, precisely these reasons have required that the law firm be disqualified where a senior lawyer transfers firm.<sup>89</sup>

The argument for disqualification is stronger when a senior lawyer rather than a law clerk transfers firm. The possibility that the law clerk possesses confidential information is much less. The law clerk will have less understanding of the relationship between the client and the firm generally and of the transactional context. It is likely that the law clerk will have performed only discrete tasks, such as researching specific points of law. The risk of the law clerk disclosing any of the former client's confidential information is relatively small. Therefore the court should more readily allow the law firm to continue its representation of its current client even though it employs a transferring law clerk. In the absence of any contrary indications the risk is too small to justify disqualifying the entire firm.

Such a conclusion can be further supported by considering the effect disqualifying the law firm would have on a inexperienced lawyer's mobility. It would be an absurd result if a

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<sup>88</sup> Bateman, above n 3, 277.

<sup>89</sup> *Equiticorp Holdings Ltd v Hawkins*, above n 45. In *EZ Paints Corp v Padco Inc*, above n 24, the court held placed significant weight on the fact that the transferring lawyer was the partner in charge of the matter and had had significant client contact.



law firm was disqualified from continuing to represent a long standing client simply because it hired a law clerk who had only a peripheral knowledge of an opposing party's confidences. The potential risk of disqualification would not be worth the benefits that hiring that particular law clerk would bring to the firm. Preserving the law clerk's mobility should outweigh any realistic risk to the confidences of the former client. The hiring of the law clerk should only cause disqualification where there is a clear risk that confidences will be disclosed.

### *B The Size of the Firm*

The size of the law firm is an important consideration in determining whether disqualification is appropriate. In smaller firms, consisting of only a few lawyers, the opportunities for inadvertent disclosure of information increase. Lawyers in such firms are more likely to communicate on a regular basis and share access to office facilities. These circumstances will cause courts to be sceptical of the effectiveness of measures employed to combat information sharing, even where the lawyers involved swear affidavits that the procedures have been strictly adhered to.<sup>90</sup> United States courts have suggested that smaller firms need more impenetrable measures to prevent disqualification.<sup>91</sup>

In larger firms, the opportunities for confidential information to pass between lawyers are less significant. Such firms are more likely to be divided into functional departments, which will assist in isolating the new lawyer from lawyers acting on the protected file. Significant physical and functional separation of lawyers enhances the ability of the law

<sup>90</sup> Although in *Novo Therapeutisk Laboratorium v Baxter Travenol Lab Inc*, above n 20, the court placed reliance on the fact that affidavits had been sworn when ruling that disqualification was inappropriate.

<sup>91</sup> *Nemours Foundation v Gilbane Aetna Federal Ins*, above n 24, 428. The court stated: "The implicit assumption is that the wall, if high and thick enough, will resist an errant attorney's lack of discretion, and calm public mistrust through prophylaxis. A firm of more moderate size must therefore erect a wall of greater impenetrability."



firm to prevent the tainted lawyer from communicating information to the lawyers currently handling the file. The presumption that lawyers share confidences has been considered unrealistic in the context of such a firm.<sup>92</sup> The size of the law firm will in part determine the nature and extent of the measures adopted to prevent the flow of confidential information.<sup>93</sup>

It is important to emphasise that the influence that the size of the firm will have on the court is a question of degree. As the law firm's size increases, there are fewer opportunities for inadvertent disclosure. These arguments will however not apply as strongly in New Zealand as they do overseas. There is significantly more scope to effectively isolate the transferring lawyer in the "mega-firms" that exist in the United States, Canada and England. Such isolation can be readily achieved because the firms are physically larger and are often functionally separated into highly specialised areas. By these standards, even New Zealand's largest firms are comparatively small. This consideration means that New Zealand law firms should be very thorough when implementing measures employed to isolate a particular lawyer in order to prevent the disclosure of confidential information.

## IX CONCLUSION

Determining whether to disqualify a law firm from continuing to act for a client when a lawyer transfers her employment involves a balancing of competing considerations. The appropriate balance depends on the circumstances of the case. This paper has demonstrated the assistance which one can gain from the consideration the issue has received in the United States and Canada.

This paper has considered the various interests that are involved when a disqualification application is decided. After analysing the different approaches adopted by various courts,

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<sup>92</sup> Above n 4, 269.

<sup>93</sup> See generally Bateman, above n 3, 279.



both in New Zealand and overseas, the approach in *MacDonald Estate* has been considered the most appropriate for New Zealand. The considerations identified in Part VI are most appropriately reconciled by adopting a rebuttable presumption that the transferring lawyer has disclosed the confidences of a former client to lawyers working in the new firm.

This differs from the approach of the New Zealand High Court in *Equiticorp Holdings*, which rejected the use of presumptions. It is important to emphasise that while the result in *Equiticorp Holdings* is not under question, parts of the reasoning in the judgment are. It is the thesis of this paper that the use of presumptions, as in *MacDonald Estate*, is preferable.

Using Chinese walls and cones of silence to rebut this presumption should not be rejected out of hand. Having said this, the possible application of these mechanisms should be tightly circumscribed. Courts must be sure that they have been effective in preventing the disclosure of confidential information to other lawyers in the firm. Where this can be shown, law firms should be entitled to rely on the barriers they establish. It is also important that New Zealand courts do not ignore the seniority of the lawyer or the size of the transferring lawyer's new firm. Determining whether confidential information has been disclosed depends, in part, on these considerations. This concern, after all, is the reason why the disqualification of law firms is sought.



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